**IN THE SUPREME COURT**
**STATE OF ARIZONA**

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| STATE OF ARIZONA,<br><br>Appellant,<br><br>v.<br><br>DANIEL LOUIS SANTILLANES,<br><br>Appellee. | No. CR-23-0042 PR<br><br>Arizona Court of Appeals<br>No. 1 CA-CR 21-0389<br><br>Maricopa County Superior Court<br>No. CR2011-108577-001<br><br>**RESPONSE TO *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND NORML** |

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## INTRODUCTION

*Amici* simultaneously agree that expungements affect the State's substantial rights and also argue against the State's right to appeal expungement orders as contrary to the intent of Proposition 207. (Br. of *Amici Curiae* Attorneys for Criminal Justice and NRML (hereinafter "Amici Br.")).

*Amici* do so based on an unfounded and false attack on the Maricopa County Attorney's Office (MCAO) and its motivations. MCAO has filed nearly twenty-thousand petitions to expunge, just as the voters tasked it to do. Of the approximately 2,400 additional expungements sought by defendants, MCAO has appealed only five—not to attack the voters' choice, but to fulfill their intent that only eligible convictions be expunged. In furtherance of voters' intent, the State has also joined defendants in appealing wrongful denials of petitions to expunge and has withdrawn an appeal when the State realized the record was insufficient to prove ineligibility. That the State has fulfilled the voters' directive by seeking appellate review in less than .2% of the petitions filed demonstrate both the State's good faith and that *Amici*'s attacks are unwarranted.

## I. Recognizing the State's Right to Appeal Expungement Orders as Affecting the Substantial Rights of the State Furthers the Purpose of Proposition 207.

Arizona voters intended that only certain, limited marijuana convictions would be expunged—and no others.[1] A.R.S. § 36–2862. The voters tasked the State with responsibilities to protect that voter interest:

(1) the State may petition for expungement;

(2) the State is notified when a petition for expungement is filed;

(3) the State may object to the petition;

(4) the State may request an evidentiary hearing; and

(5) the State may present evidence at an evidentiary hearing to demonstrate that the conviction is not eligible for expungement.

A.R.S. § 36–2862. Arizona voters substantially involved the State in the expungement process to ensure that only certain, limited offenses—and only those

[1] *Amici* argues A.R.S. § 36–2862 is remedial in nature. (Amici Br. at 4.) This is unclear because "remedial statutes 'are designed to redress existing grievances and introduce regulations conducive to the public good.'" *LaWall v. Pima County Merit System Com'n,* 212 Ariz. 489, 492 ¶ 6 (App. 2006) (quoting *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974)). Proposition 207 is a voter-passed initiative that legalized certain conduct related to marijuana and provided for expungement of records for specific marijuana-related offenses. *See* A.R.S. §§ 36–2850 to 36–2865. However, this Court need not decide if the statute is remedial because "[s]tatutes shall be liberally construed to effect their objects and to promote justice." A.R.S. § 1–211(B). Furthermore, "the primary rule of statutory construction is to find and give effect to legislative intent." *LaWall*, 212 Ariz. at 492 ¶ 6 (quoting *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n,* 181 Ariz. 119, 121 (1995)).

certain, limited offenses—were expunged. A.R.S. § 36–2862(A). In short, the voters asked the prosecuting agencies to enforce the new statute by both supporting (and proactively petitioning for) qualifying expungements and objecting to and disproving the unqualifying petitions.

## II. Contrary To Amici's False Assertions, MCAO Has Fervently Worked To Expunge Convictions Consistent With The Voters' Intent.

To date, MCAO has filed approximately 19,500 petitions to expunge marijuana-related convictions. (Appx. A, Declaration of Jason Kalish, signed 06/27/2023.) Thus far, MCAO has sought appellate review in approximately five cases[2]—and agreed with the defendant in two appeals filed by defendants. *See State v. Sorensen*, -- P.3d --, 2023 WL 3702761, at ¶ 4 (App. 2023) ("the State petitioned to expunge all records related to Sorensen's arrest and conviction"); *State v. Williams*, 254 Ariz. 516 ¶ 3 (App. 2023). Five appeals of unqualified petitions against 2,400 petitions filed by defendants and 19,500 petitions to expunge

[2] In addition to the pending case, MCAO has sought appellate review in: *State v. White*, CR2011-114695-001, CA-CR 22-0098; *State v. Vogel*, CR2010-102686-001, CA-CR 22-0113; *State v. Wanna*, No. 1 CA-CR 21-0438, 2023 WL 2318465 (Ariz. App. Mar. 2, 2023) (mem. decision); and *State v. Nanez*, CR2017-138793-001, No. 1 CA-SA 23-0034 (Appx. B, Petition for Special Action, CR2017-138793-001, No. 1 CA-SA 22-0034, filed 02/17/2023). However, MCAO entered a stipulated dismissal of *State v. Vogel*, CR2010-102686-001, No. 1 CA-CR 22-0113. (Appx. C, Stipulation to Dismiss Appeal, CR2010-102686-001, No. 1 CA-CR 22-0113, filed 01/26/2023.)

voluntarily filed by MCAO indicates an agency fulfilling the voters' intent; not the abuse of prosecutorial power as alleged by *Amici*.

MCAO recently sought review—via special action because the Court of Appeals' Opinion on review found the State had no right to appeal—where the trial court intentionally expunged convictions involving the sale of cocaine and oxycodone—clearly outside the purview of A.R.S. § 36–2862. (Appx. D, Petition to Expunge Marijuana-Related Offense Records Pursuant to ARS § 36—2862, CR2017-138793-001, filed 01/03/2023; Appx. E, State's Response to Petition to Expunge, CR2017-138793-001, filed 01/10/2023; Appx. F, Ruling/Order Granting Expungement, CR2017-138793-001, filed 02/06/2023.) In granting the expungement, the superior court explained:

> To the extent some or all of the charges do not qualify for expungement under A.R.S. § 36–2862, the Court nonetheless grants the Petition and expunges these records.

(Appx. F, at 2.) The voters specified a limited category of offenses to be expunged. While *Amici* argue that MCAO attempts to block legitimate expungements, MCAO also responds to petitions to expunge convictions that clearly do not qualify under A.R.S. § 36–2862. Recognizing the State's right to appeal—especially in cases like that just described—furthers the voters' intentions. In Proposition 207 the voters created a right to expungement for specific types of cases. It would be contrary to

the voters' intent to limit expungement to just those cases if the State has no right to appeal when courts erroneously grant expungement in an ineligible case.

*Amici* argue the State "seeks to create an additional hurdle" against individuals seeking expungements. (Amici Br., at 6.) This claim is unfounded. To accuse the State of attempting to gut the will of the people—while being entrusted to carry out the will of the people—is without merit or basis in reality. As charged by Proposition 207, MCAO has thus far:

- filed approximately 19,500 petitions[3] to expunge marijuana-related convictions that meet the standards under A.R.S. § 36–2862;
- agreed with the majority of petitions to expunge filed by defendants;
- sought re-sentencings;[4] and
- agreed to re-sentencings where a now-expunged conviction was used to enhance a sentence.[5]

MCAO does not even regularly oppose expungements. Rather, MCAO has acted to further the voter's intentions by enacting Proposition 207 to ensure only eligible convictions are expunged. Accordingly, and because expungements affect the

[3] Appx. A.

[4] *See e.g.,* Appx. G, *State v. Laws,* CR2018-156744-001, State's Mot. to Set Re-Sentencing Hearing, 07/25/2022; Appx. H, *State v. Crain,* CR2019-005421-001, Response to Defendant's Rule 32 Petition for Post-Conviction Relief, 08/31/2022.

[5] *See State v. Williams,* 254 Ariz. 516 ¶ 3 (App. 2023)

substantial rights of the State, the State asks this Court to recognize the State's right to appeal under A.R.S. § 13–4032(4).

## III. Recognizing the State's Right to Appeal Does Not Prejudice Individuals Seeking Expungements.

*Amici* argue that if this Court recognized the State's right to appeal an unlawful expungement order, it would create a chilling effect for those seeking expungement. (Amici Br. at 6.) This claim is meritless. Permitting the State to appeal such cases defends and fulfills Arizona voters' intent to bar expungement of convictions that do not fall within A.R.S. § 36–2862(A). The only things that stands to be "chilled" are unlawful expungements, and petitions seeking them. But this Court has not, and should not, expand the term "prejudice" to mean a party's ability to seek review of an illegal court order contravening voter intent and the clear statutory parameters of the law. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 374 (1993) (O'Connor, concurring) ("[W]e hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission.")

MCAO cannot seek appellate review every time an expungement is granted and has demonstrated it would not based on only seeking review of approximately five cases out of more than 20,000 expungements granted in Maricopa County. *Amici*'s argument is further controverted by the fact that even if an individual seeks

expungement and the State's appeal is successful, the individual is in no worse a position than before filing the petition to expunge. Rather, the individual remains in the position that the voters intended.

*Amici* argue that the possibility of records being "reopened after a lengthy appeal by the State, renders Proposition 207's promise of sealed records illusory." (Amici Br. at 7.) This argument has no merit because records would only be unsealed after a reviewing court found the expunged conviction was improperly expunged. That fulfills the voters' intent: only limited and specified convictions should be expunged. A.R.S. § 36–2862(A). The Arizona electorate did not defer to the discretion of judges in determining what convictions should be expunged. Rather, the voters defined what limited convictions can be expunged. Arizonans further entrusted the State with ensuring only those limited marijuana-related convictions were expunged. If a court reversed an unlawful expungement, the records should not have been expunged in the first place.

*Amici* argue that an appeal itself would allow the State to "make it impossible for a petitioner to actually seal records of a prior conviction or arrest because the appellate record would be publicly available and searchable, regardless of the results of the appeal." (Amici Br. at 7.) This argument fails because a conviction that a reviewing court determines to be properly expunged would remain expunged, including any appellate record (which would also exist if the State is forced to seek

appellate review through special action). As it relates to the defendant, records regarding the prior convictions would remain expunged. *See* A.R.S. § 36–2862(E) ("An individual whose record of arrest, charge, adjudication, conviction or sentence is expunged pursuant to this section may state that the individual has never been arrested for, charged with, adjudicated or convicted of, or sentenced for the crime that is the subject of the expungement.")

## IV. There Is No Conflict Between Section 13–4032 and Section 36–2862; And Section 36–2862 Does Not Abrogate Section 13–4032 Sub Silentio.

"If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation." *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268 (1994).

Reading A.R.S. § 36–2862 and § 13–4032 together shows no conflict or abrogation. "The primary aim of statutory construction is to find and give effect to legislative intent." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327 ¶ 11 (2001). Statutes that relate to the same subject matter are read together. *Planned Parenthood Ariz., Inc. v. Brnovich*, 254 Ariz. 401 ¶ 11 (App. 2022). Courts consider "the literal meaning of the wording" as well as "the whole system of related statutes. *Id.* (quoting *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970)). This is true "even where the statutes were enacted at different times, and contain no reference one to the other, and it is immaterial that they are found in different chapters of the revised statutes." *Id.* Statutes that address the same subject or general purpose "should be

read together and harmonized when possible." *Lagerman v. Ariz. State Ret. Sys.*, 248 Ariz. 504, 507 ¶ 13 (2020) (quoting *David C. v. Alexis S.*, 240 Ariz. 53, 55 ¶ 9 (2016)). "[W]hen two statutes appear to conflict, whenever possible, we adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved." *UNUM Life Ins. Co. of Am.*, 200 Ariz. at ¶ 28.

*Amici* argue that the purpose of Proposition 207 "expressly excludes the State's right to appeal." (Br. Amici, at 12.) However, an expungement granted pursuant to A.R.S. § 36–2862(F) affects the State's substantial rights and therefore allows the State to appeal under A.R.S. § 13-4032(4). Under A.R.S. § 36–2862(F):

> F. If the court denies a petition for expungement, the petitioner may file a direct appeal pursuant to § 13-4033, subsection A, paragraph 3.

Because A.R.S. § 13–4033(3) provides for an appeal of "[a]n order made after judgment affecting the substantial rights of the party," it necessarily follows that an expungement order affects substantial rights.

There is no conflict between A.R.S. § 36–2862 and § 13–4032. First, the former does not reference or address the latter. Courts do not infer that a statute abrogates another statute sub silentio. Second, any alleged conflict can be resolved by reading the two statutes together: A.R.S. § 36–2862 involves expungement orders that affect the substantial rights of a party (voters' choices and line drawing), and A.R.S. § 13–4032 allows the State to appeal an order made after judgment that

affects the State's substantial rights (voters' choices and line drawing). Any interpretation of A.R.S § 36–2862 that does not support the State's right to appeal expungement orders would create conflict among the statutes and deny meaning to A.R.S § 13–4032.

*Amici* argue that by referencing a right to appeal of the *petitioner*—which *amici* agree could be the State—the voters necessarily intended to abrogate the State's right to appeal an order affecting its substantial rights. (Amici Br., at 11.) However, there is no indication in the act itself or in its history that even implies an intent by the voters to limit the State's right to appeal, which is necessary for such a bold departure. *See* *Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 103 (1983) (holding that to depart from the underlying principles of the previous statutory regime, there must be clear indications in the new act or its legislative history supporting such a departure). Further, this argument is belied by the fact that "repeal of statutes by implication is not favored in the law." *Pima Cnty. by City of Tucson v. Maya Const. Co.*, 158 Ariz. 151, 155 (1988).

*Amici*'s argument that the State's right to appeal is excluded because it is not listed in a prescribed list fails because A.R.S. § 36–2862 does not create an applicable list. Although Proposition 207 contains a clear list of offenses eligible for expungement, A.R.S. § 36–2862(A), it contains *no* list regarding a right to appeal. *See* *State v. Maestas*, 244 Ariz. 9 ¶ 15 (2018) (since the AMMA sets forth a

list of locations where the legislature may impose "civil, criminal, or other penalties" and the list did not include college and university campuses, the AMMA was not intended to criminalize the use of marijuana in said unlisted locations.) Furthermore, the voters included a list under A.R.S. § 36–2862(A) to identify the categories of offenses that are eligible for expungement, evincing awareness of the limitations imposed by including exclusive lists in a statute.

There is no conflict between A.R.S. § 36–2862 and A.R.S. § 13–4032, nor does the former abrogate the latter. Instead, A.R.S. § 36–2862(F) recognizes that an expungement affects a party's substantial rights. The State has a right to appeal an order affecting the State's substantial rights. A.R.S. § 13–4032(4). Recognizing these rights furthers the voters' intentions when they enacted Proposition 207.

## V. Conclusion

The court of appeals erred as a matter of law in finding the State had no right to appeal an expungement order. The statute does not create an exclusive list of when an appeal may lie. The statute does not sub silentio bar an appeal where it simultaneously directs the State to object to unqualified petitions. Regarding the suggestion that the State is attacking the will of the voters, the numbers speak for themselves. The State has appealed less than 0.2% of expungement orders in Maricopa County, including the expungement of convictions for the sale of cocaine and oxycodone. All would agree this is aligned with the will of the voters.

Submitted June 27, 2023.

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